

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

MEDLAR ELECTRIC, INC. and
BOHRER REAGAN CO.¹

Joint Employers

and

Case 4–RC–20249

TEAMSTERS LOCAL UNION
NO. 429, a/w INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA²

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that Medlar Electric, Inc., (herein Medlar) and Bohrer Reagan Co. (herein Bohrer) are joint employers (herein called the Joint Employers). The Joint Employers are engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Joint Employers.

¹ The name of the Joint Employers appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

4. A question affecting commerce exists concerning the representation of certain employees of the Joint Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Medlar performs electrical construction work primarily on public sector jobs such as schools and treatment plants. Bohrer is a mechanical construction company that installs air conditioning and heating systems. The Petitioner seeks to represent a unit of the Joint Employers' four full-time truck drivers.³ The Joint Employers contend that four warehouse employees⁴ are part-time truck drivers and should be included in the unit as dual function employees. Alternatively, the Joint Employers contend that the warehouse employees share a community of interest with the truck drivers and must be included in an appropriate unit. The Petitioner asserts that even if the other warehouse employees are included in the bargaining unit, one of them, Eric Sanders, is a supervisor within the meaning of Section 2(11) of the Act and should be excluded.

Kenneth Field is the president and owner of both of the Joint Employers, which share offices and a warehouse in Blandon, Pennsylvania. The Joint Employers employ about 280 employees, approximately 160 of whom are electricians represented by the International Brotherhood of Electrical Workers and several of its locals. The Joint Employers have approximately 100 vehicles, most of which are pickup trucks used by the electricians for transportation to and from job sites. Truck drivers use the remaining eight to ten vehicles, which include two large stake body trucks with 20-foot beds, two small stake body trucks with 12-foot beds, a closed box truck with a 21-foot bed, a dump truck, and several pickup trucks of various sizes.

The truck drivers are primarily responsible for transporting equipment and materials between the warehouse and job sites. Truck drivers Bruce Favinger and Anthony Citrullo transport these items for Medlar and are supervised by Tom Gruber. Stephen Roberts and Ronald Sobjack transport Bohrer materials and equipment and are supervised by Michael Reagan. After the truck drivers arrive for work at the warehouse each morning at 7:00 a.m., they load their trucks, with the assistance of warehouse employees.⁵ They then leave the warehouse, typically by 8:00 a.m., to make their assigned deliveries to various job sites. Favinger drives a large stake body truck, Citrullo drives a small stake body truck and Roberts and Sobjack each drive either a large stake body truck or a closed box truck. Each truck driver makes approximately four or five deliveries per day transporting electrical supplies such as generators, lights, and conduits for Medlar and duct work or air conditioning units for Bohrer. The job sites may be as far as 100 miles away from the warehouse. After they arrive at job sites, the drivers sometimes unload the trucks with the assistance of employees there. When they have completed their deliveries, the drivers return to the warehouse, usually at around 3:00 p.m. to 4:00 p.m. On the days that they return to the warehouse early, the drivers perform other duties such as cleaning the warehouse or assisting warehouse employees in moving materials. In order to drive the large stake body trucks, truck drivers are required to have a medical certification.

³ The full-time truck drivers are Anthony Citrullo, Bruce Favinger, Ronald Sobjack, and Stephen Roberts.

⁴ The Joint Employers refer to these employees as part-time truck drivers/warehousemen. For simplicity, this Decision will refer to them as warehouse employees. Their names are Bruce Brooks, Thomas Luckenbill, Eric Sanders and Gary Adams.

⁵ At times, the trucks have been loaded the previous night.

Each of the warehouse employees performs a variety of different tasks. Gary Adams is primarily responsible for maintaining and distributing tools in the “tool crib,” which is located in an enclosed area in the warehouse near his desk. Adams receives tool requests from job sites and then gathers the tools and ensures sure that they are loaded onto the correct trucks. He also repairs tools when necessary. Using a pickup truck, Adams occasionally transports supplies or equipment from local supply stores as needed. In addition, if no truck driver is available, Adams will personally deliver tools directly to local job sites, but not to more distant sites. He also tows job trailers and large equipment such as compressors and hydraulic lifts to job sites. He generally drives somewhere every day. Adams does not load or unload trucks except when another employee is absent. His supervisors are Kenneth Field and his son Brendan Field. Kenneth Field estimated that Adams spends about 30 to 40 percent of his time driving, the most of any warehouse employee.⁶

Warehouse employee Eric Sanders is primarily responsible for unloading trucks with a forklift and placing the materials in the warehouse. Sanders also assists the truck drivers and warehouse employees in loading trucks. His desk is located in a warehouse office that he shares with several other employees. He typically brings items from suppliers to the warehouse but occasionally goes to local job sites. He also delivers the mail to the post office. Sanders makes these deliveries during the day when no full-time truck drivers are available because they are making other deliveries. The materials he delivers are the same as those delivered by the full-time drivers but in smaller quantities. He does not drive every day, but is likely to drive several times per week. Field estimated that Sanders spends approximately ten percent of his work time driving a pickup truck. He is supervised by Gruber.

Warehouse employee Thomas Luckenbill’s primary function is to order miscellaneous metals and materials for Bohrer. He also occasionally transports small quantities of supplies from suppliers to the warehouse or local job sites using a pickup truck or delivery van. Like Sanders, he does not drive every day but is likely to drive several times per week. At times he assists in the loading and unloading of vehicles. Field testified that Luckenbill spends approximately 85 percent of his time performing warehouse duties and the remaining 15 percent of his time driving materials to and from the warehouse and job sites. Luckenbill’s supervisor is Michael Reagan, and his desk is located in the same warehouse office as Sanders’ desk.⁷

Bruce Brooks is the Joint Employers’ equipment operator. He operates all of the heavy equipment, such as backhoes and Bobcats, which he tows to the job sites with a dump truck. Brooks is required to hold a commercial driver’s license (CDL) to drive the dump truck; no other warehouse employee or truck driver has such a requirement. While on job sites, Brooks loads and unloads dirt and stone from the dump truck and performs trenching and excavation work. At times he also drives a pickup truck, which he uses to transport material for concrete work. Field estimated that 25 to 30 percent of Brooks’ time is spent driving, and most of his remaining time is spent doing construction work. Brooks’ supervisor is Spiro Apostolou.

⁶ Field has limited personal knowledge of the percentage of time that warehouse employees spend driving. Much of his knowledge is derived from conversations with Gruber. Additionally, his office is near the warehouse, and he spends some time there every day.

⁷ Prior to becoming a warehouse employee two years ago, Luckenbill served as a full-time truck driver.

When full-time truck drivers are unavailable for work, warehouse employees may fill in for them, but other full-time truck drivers also are likely to substitute for them. None of the warehouse employees is required to have a medical certification. All four truck drivers must complete timecards indicating how many hours they spend each week on a particular job, thus enabling the Joint Employers to bill their delivery time to specific clients. Of the warehouse employees, only Brooks, who performs construction work, has his time billed separately to particular jobs. Sanders and Adams do not complete timecards, and Field was unsure whether Luckenbill fills out timecards.

Truck drivers and warehouse employees are all paid on an hourly basis. Truck drivers Sobjack and Roberts earn \$11.37, Favinger earns \$11.62½ and Citrullo earns \$12.15 per hour. Pursuant to prevailing wage laws, the Joint Employers pay Brooks the Operating Engineers' rate of between \$27 and \$32 per hour when he operates equipment. Of the other warehouse employees, Adams earns approximately \$15.25, Sanders earns \$14.75, and Luckenbill earns approximately \$12.50 per hour.⁸ Truck drivers and warehouse employees all work from 7:00 a.m. to 3:30 p.m. The truck drivers and warehouse employees all get a half-hour lunch break. Favinger, the only employee witness, testified that he very rarely sees warehouse employees other than Brooks in the field, but he regularly sees the other truck drivers.

The Joint Employers contend initially that the warehouse employees should be included in the petitioned-for unit as part-time drivers, pursuant to the Board's dual function employee test. The test for whether a dual function employee, i.e., one who performs at least two functions for the same employer, should be included in a unit is whether the employee regularly performs unit work for sufficient periods of time to demonstrate that he or she has a substantial interest in the unit's wages, hours and conditions of employment. *Continental Cablevision of St. Louis County, Inc.*, 298 NLRB 973 (1990); *Berea Publishing Co.*, 140 NLRB 516, 519 (1963). Among the Joint Employers' warehouse employees, only Adams meets this test. Thus, Brooks does not perform the same type of work as the full-time truck drivers, but is a heavy equipment operator who drives a dump truck as part of his construction excavation work. His truck driving work is not similar to the transportation of materials and equipment to multiple job sites performed by the full-time truck drivers. As he does not perform any unit work he is not a dual function employee. Sanders and Luckenbill transport materials and equipment for the Joint Employers, but they drive for only 10 to 15 percent of their work time. Therefore, even if their driving were deemed unit work, the percentage of their work time that they spend driving the Joint Employers' vehicles is too low to include them in the unit as dual function employees. *Pacific Lincoln-Mercury, Inc.*, 312 NLRB 901, fn. 4 (1993); *Continental Cablevision of St. Louis County, Inc.*, *supra*; *Wilson Engraving Company, Inc.*, 252 NLRB 333 (1980).⁹ Moreover, their work is somewhat different than the work performed by the full-time truck drivers and can only

⁸ These wage rates are based on Fields' testimony, which was somewhat uncertain. The Joint Employers did not produce payroll records, which would have definitively established the rates.

⁹ The Board in that case included as dual function employees individuals who performed unit driving work for at least 35 percent of the time but excluded employees who performed unit work 25 percent of the time or less. In *Fleming Industries, Inc.*, 282 NLRB 1030 (1987), fn. 1, the Board stated that although in *Wilson Engraving* the Board discussed community of interest factors in its dual function analysis, if the employee performs a substantial amount of unit work, he or she may be included in the unit without regard to community of interest factors. See also *Oxford Chemicals, Inc.*, *supra*.

loosely be described as unit work. Thus, they do not drive stake body trucks or closed box trucks, but only pickup trucks and vans. Rather than carrying large loads to job sites, they generally carry a few items from suppliers to the warehouse or run errands such as bringing mail to the post office. They occasionally drive to job sites, but unlike the truck drivers, they travel only to the nearby sites. They do not drive on a regular, daily basis, but only as the need arises. Adams, in contrast to Sanders and Luckenbill, drives on a daily basis for about 30 to 40 percent of his work time. Similar to Sanders and Luckenbill, he drives different vehicles and carries smaller quantities to closer sites than the full-time truck drivers do. However, unlike them, he drives on a regular daily basis, and he sometimes tows job trailers and heavy equipment. Thus, he performs unit work enough that he has a substantial and continuing interest in the terms and conditions of employment of the drivers. *Oxford Chemicals, Inc.*, 286 NLRB 187 (1987);¹⁰ *Wilson Engraving Company, Inc.*, supra.

The Joint Employers further contend that the petitioned-for unit itself is inappropriate. In this regard, they assert that the warehouse employees have a community of interest with the full-time truck drivers and therefore must be included in the unit.

In deciding the appropriate unit, the Board first considers the union's petition and whether that unit is appropriate. *P.J. Dick Contracting*, 290 NLRB 150 (1988). The Board, however, does not compel a petitioner to seek any particular appropriate unit. The Board's declared policy is to consider only whether the unit requested is an appropriate one, even though it may not be the optimum or most appropriate unit for collective bargaining. *Black & Decker Mfg. Co.*, 147 NLRB 825, 828 (1964). "There is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act only requires that the unit be 'appropriate.' " *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), enfd. on other grounds 190 F.2d 576 (7th Cir. 1951); see *Staten Island University Hospital v. NLRB*, 24 F.3d 450, 455 (2d Cir. 1994); see also *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610 (1991), interpreting the language of Section 9(a) as suggesting that "employees may seek to organize 'a unit' that is 'appropriate'—not necessarily the single most appropriate unit." A union is, therefore, not required to request representation in the most comprehensive or largest unit of employees of an employer unless "an appropriate unit compatible with that requested unit does not exist." *P. Ballantine & Sons*, 141 NLRB 1103, 1107 (1963); accord: *Ballentine Packing Co.*, 132 NLRB 923, 925 (1961). See *Overnite Transportation Company*, 322 NLRB 723 (1996).

In making unit determinations the Board weighs a variety of factors, including differences in employee interests and working conditions, wages, or compensation; different hours of work and benefits; separate supervision; degree of dissimilar qualifications, training and skills; differences in job functions; frequency of contact with other employees; work situs of the various classifications; degree of integration or interchange of work between classifications and the history of bargaining; and whether they are part of an integrated operation. *Overnite Transportation*, above at 724 (1996); *Esco Corp.*, 298 NLRB 837, 839 (1990); *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962).

¹⁰ In that case, the Board noted, inter alia, that the amount of unit work performed by the employee is determinative, "regardless of its difficulty relative to other types of unit work."

Considering the above factors, I find that the petitioned-for unit of full-time drivers is appropriate. There are significant distinctions between the full-time truck drivers' job duties and work locations and those of the warehouse employees. The truck drivers spend the vast majority of their day away from the warehouse, delivering materials and equipment to various job sites. In contrast, the warehouse employees work predominantly in the warehouse, where they are provided with desks. Other than at the beginning and end of the workday, the truck drivers have no contact with warehouse employees. For the most part, the warehouse employees' jobs require skills other than driving. Thus, Sanders operates a forklift, Adams maintains and repairs tools, and Luckenbill requires expertise in ordering materials. Furthermore, as discussed above, warehouse employees' driving work is materially different from that of the truck drivers. Because they drive larger vehicles, truck drivers are required to maintain medical certifications, but the warehouse employees, other than Brooks, are not. Brooks performs highly skilled construction work, which is entirely different from the work of the truck drivers, and he has little in common with them. Unlike the warehouse employees, the truck drivers' time is billed to specific jobs. Warehouse employees receive somewhat higher compensation than the drivers do. Thus, Luckenbill earns about 35 cents per hour more than the truck drivers, Sanders and Adams earn about 2 to 3 dollars more, and Brooks is paid more than twice as much. The factor of supervision is inconclusive in that some of the drivers and warehouse employees share common supervision, but Brooks' and Adams' supervisors do not supervise any drivers. Although the drivers occasionally perform limited warehouse work if they return early from their deliveries, and warehouse employees sometimes work together to load the trucks, their jobs are not so closely integrated as to require their inclusion in the same unit. Considering all of the above, the interests of the two groups are not sufficiently close as to require warehouse employees in the truck driver unit. *Home Depot USA, Inc.*, 331 NLRB No. 168 (2000); *Rinker Materials Corporation*, 294 NLRB 738 (1989). Cf. *Levitz Furniture Co. of Santa Clara, Inc.*, 192 NLRB 61 (1971).¹¹

The Petitioner asserts that even if warehouse employees are included in the unit, Sanders is a supervisor of truck drivers Favinger and Cirullo and consequently should be excluded. In view of the warehouse employees' exclusion from the unit, it is unnecessary to decide whether he is a supervisor, but inasmuch as the issue was fully litigated, it will be considered in this Decision. The record shows that Supervisor Gruber determines the two drivers' assignments and gives them to Sanders. Favinger delivers the larger loads because his truck is larger. Each morning Favinger and Cirullo report to Sanders' office for their daily assignments, and Sanders gives them each a list of materials to be loaded onto the truck and delivered to job sites. On one occasion Sanders criticized Favinger for leaving a truck at the job site, and Favinger worked overtime to pick up the truck. Sanders also occasionally criticizes Favinger's work by saying things to him such as, "what's taking you so long," and "you're wasting too much time." He has never given Favinger a written warning. Sanders approves Favinger's overtime by initialing his timecard, but Favinger testified that he does not know whether Sanders or Gruber actually assigns the overtime. According to Field, Sanders has authority only to verify that the driver worked the amount listed on the time sheet.

¹¹ The Joint Employers called Thomas Rochowicz, the President of the Petitioner, to testify as to the local industry practice of whether warehouse employees and truck drivers are included in the same unit. The Board's test for determining the appropriateness of the unit, as set forth above, does not include this factor, and his testimony is therefore irrelevant.

A finding of supervisory status is warranted only where the individual in question possesses one or more of the indicia set forth in Section 2(11) of the Act. *The Door*, 297 NLRB 601 (1990). The statutory criteria are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Juniper Industries*, 311 NLRB 109, 110 (1993). The statutory definition specifically indicates that it applies only to individuals who exercise “independent judgment” in the performance of supervisory functions and who act in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. *Robert Greenspan, DDS*, 318 NLRB 70 (1996) *enfd.* 101 F.3d 107, (2nd Cir. 1996), *cert. denied* 519 US 817 (1996), citing *NLRB v. Lindsay Newspapers*, 315 F.2d 709, 712 (5th Cir. 1963); *Gaines Electric*, 309 NLRB 1077, 1078 (1992); *Ohio River Co.*, 303 NLRB 696, 714 (1991), *enfd.* 961 F.2d 1578 (6th Cir. 1992). The burden of establishing supervisory status is on the party asserting that such status exists. *Fleming Companies, Inc.*, 330 NLRB No. 32, fn. 1 (1999); *Bennett Industries*, 313 NLRB 1363 (1994). Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Phelps Community Medical Center*, *supra*, 295 NLRB 486, 490. (1989).

The Petitioner’s claim of supervisory status rests on its assertion that Sanders assigns and directs the work of Citrullo and Favinger and has the authority to discipline them and authorize their overtime. The record fails to establish, however, that Sanders has independent authority to direct or assign work. Although Sanders distributes work assignments each morning, the assignments are prepared by Gruber and dictated in part by the size of the load to be delivered. The record does not show that Sanders has authority to discipline; at most he has verbally criticized some of Favinger’s work. Finally, the evidence shows that Sanders initials Favinger’s timecard but not that he has the authority to authorize overtime. Based on the foregoing, I find that the Joint Employers have not carried the burden of proving that Eric Sanders is a supervisor within the meaning of the Act.. *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998); *Consolidated Services, Inc.*, 321 NLRB 845 (1996).

Accordingly, I find that the following employees of the Joint Employers constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time truck drivers employed by the Joint Employers, excluding all other employees, guards, and supervisors, as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued

subsequently,¹² subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Additionally, eligible are those employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months, or who have had some employment in that period and have been employed for a total of 45 working days within the 24 months immediately preceding the payroll period ending immediately preceding the date of this Decision, and also have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.¹³ Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

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LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the **full** names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region Four within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **August 30, 2001**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement of such

¹² Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Joint Employers must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

¹³ *Steiny & Co.*, 308 NLRB 1323 (1992); *Daniel Construction*, 133 NLRB 264 (1961), modified in 167 NLRB 1078 (1967).

list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of **3 copies**, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall, or by department, etc.). If you have any questions, please contact the Regional Office.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **September 6, 2001**.

Signed: August 23, 2001

at Philadelphia, PA

/s/

JOHN D. BREESE

Acting Regional Director, Region Four

440-1760-6200

362-6790-2500

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